Brief of Youmans for P. in E.

Filed May 10, 1897.

ARGUMENT CONTRA.

MOTIONS TO DISMISS AND TO AFFIRM.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1896.

No. 317

THE COLUMBIA WATER POWER COMPANY, PLAINTIFF IN ERROR,

vs.

THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER COMPANY, DEFENDANT IN ERROR.

LEROY F. YOUMANS,
FOR PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1896.

No. 729.

THE COLUMBIA WATER POWER COMPANY, PLAINTIFF IN ERROR,

vs.

THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER COMPANY, DEFENDANT IN ERROR.

The defendant moves this Court to dismiss the writ of error herein to the Supreme Court of the State of South Carolina, issued on the allowance of the Chief Justice of the Court last named, for want of jurisdiction, because, as it claims, none of the Federal questions raised in the State trial or Supreme Court were involved in the judgment and decision brought up here for review.

The defendant also moves this Court to affirm said judgment, because, conceding that the record shows that this Court has jurisdiction, and that all these Federal questions were involved in that judgment, and were decided adversely to the claims set up by the plaintiff, yet they were all so frivolous as not to need further argument, and it is manifest that the writ was taken for delay only.

I.

In considering what, germane to this discussion, was decided by the State Court, it should be premised that, under the law and practice then existing, the Supreme Court of the State of South Carolina consisted of three Judges, a Chief Justice and two Associate Justices (So. Ca. Cons. 1868, Art. 4, §§ 2 and 9), and the decree of a Circuit Judge, including what was said in the opinion, was, in any given case in which the decree was made, *res judicata*, and the law of that case until its reversal by two of the Judges of the State Supreme Court. So. Ca. Cons. 1868, Art. 4, § 12; Code, § 14; 2 Rev. St. So. Ca. 1893, page 9.

In this case, the only portion of the Circuit decree as to which there was concurrence, either in affirmance or reversal, by two of the Judges of the State Supreme Court, was the result, to wit: the affirmance of the *judgment* of the Circuit Court, "that the complaint be dismissed."

As the Circuit decree, Hudson, J., was pronounced *oretenus*, immediately at the close of the argument, and was taken down from his lips, the seven portions of that decree to which attention is called are purposely not presented in the textual order in which they appear in the decree, to wit:

1. The plaintiff acquired its rights under the act of 1887, which was a contract between the State and the plaintiff; and claims that those rights have been affected and violated by the contract made between the defendant and the State, to wit: the contract made by defendant with the Board of Directors of the State Penitentiary, 1892, approved and ratified by the State 1892, which said contract this Court has jurisdiction to construe.

2. This last mentioned contract and act have given to defendant all of the rights which the State had in the five hundred horse power of water power under the contract between the State and the plaintiff, made by the act of 1887.

3. That right of the State to the five hundred horse power of water power is absolute, and the State can dispose of it in any way she chooses.

4. Under the act of 1892, the defendant, as lessee of the State, has the *unquestionable* right to put the electric plant on the banks of the *[Columbia] Canal, and to carry out the contract which has been made between it and the State.

5. Under the act of 1892, defendant has the *supplementary* right to put in and erect a steam plant on the banks of the canal. [Nos. 4 and 5 are in the decree, notwithstanding earlier in it is No. 6.]

6. The State conveyed the canal property to the plaintiff, and thereby conveyed in fee all of the property known as the "canal property," *including its banks*, as it existed at the time of the conveyance.

At the time of the passage of the act of 1887, and of the conveyance made thereunder, the canal property covered the land upon which the defendant's works have been since erected.

7. I hold that there has been no violation of the State's contract with the plaintiff.

Despite the assumptions *contra* in defendant's Brief, page 19, this decree does pass on the act of 1892—is not based solely on the act of 1887. What is held about it is not a mere incidental mention of the act of 1892, is not a mere indication that the Court did not consider that it had any effect upon the rights which the plaintiff had.

On the contrary, the decree is a most unequivocal decision, *inter alia*, that all of the actings and doings of defendant complained of by plaintiff in the pleadings were authorized and justified by the act of the Legislature of 1892, and the contract with defendant which that act approved and ratified, that the contract and the act of 1892 did not impair the obligation of the contract made by the State with the plaintiff by the act of 1887, and that the contract and act of 1892 and the said actings and doings of defendant were none of them violations of the contractual rights of plaintiff acquired under the act of 1887, or deprivations of plaintiff of its property without due process of law.

The decree *ab ovo usquead mala* is

1. A construction of the act of 1887, which it holds was a contract made by the State with the plaintiff, and of the rights of the contracting parties thereunder.

2. A construction of the contract of 1892, made with the defendant, and of the act of 1892, approving and ratifying the same, and of the rights of the contracting parties thereunder.

3. A decision that the obligation of the contract of the act of 1887 was in no manner impaired by the later contract with defendant and the later act of 1892, which it held did not deprive plaintiff of its property

*In the decree the words are, "the canal of the penitentiary," but the Columbia Canal, the plaintiff's canal, is the only one in the case or in the vicinity.

without due process of law. *It is, in truth, law, and fact, the decision of Federal questions and nothing else.*

Take these from it and there will not be left even what Sir Walter Scott thought would be left of "the play of Hamlet with the part of the Royal Dane omitted"—not only no substance, but no shell.

It will not avail defendant to escape from this—to say that this is merely the decision of the Circuit Court, and not of the State Supreme Court. None of these seven portions of this decree, adjudications, holdings, findings ("Call them what you will," to use the Circuit Judge's words), were overruled by the State Supreme Court or any of them even questioned, save one by one member of that Court, though both plaintiff and defendant carried up in proper form, by exceptions, such portions of the Circuit decree as they deemed to be error, impinging on their rights. For plaintiff's exceptions, see Record, pp. 23-25, fols. 43-47.

The entire decree of the Circuit Judge is the decision and judgment of the State Court; the dismissal of the complaint with which the Circuit decree concludes being *expressly* affirmed, and all the rest of the decree being affirmed by non-reversal.

Before taking up the several actions of the three State Supreme Court Judges, attention is called to these adjudications of this Court:

"It has never been held that the record of the proceedings of the highest Court must state in terms a misconstruction by that Court of the act of Congress. It is enough that it is an inference of law from the inspection of the whole record, that the highest Court did thus misconstrue an act of Congress, and annul a right or title, otherwise valid by reason of said misconstruction. Any other rule confining this Court to an inspection of that part of the record which sets out the proceedings of the highest Court alone, would be a departure from the general principle, that the whole of the instrument is to be looked at to determine the effect of each part of it, and would present for decision an artificial and not a real case; and inasmuch as the highest State Court often simply reverses or affirms the judgment below, would, in all such cases, deprive the citizen of the rights secured to him by the Constitution, and § 25 of the Judiciary Act. And it has been the practice of this Court, whenever necessary, to look at the proceedings of the inferior State Court in connection with the proceedings of the highest Court, in order to deduce therefrom the points decided by the latter. Now, the bill of exceptions taken in this case in the Circuit Court shows that the construction of the act of Congress was in question in that Court, was misconstrued there, and a deed under which the plaintiff in error deduced title, was declared to be void by reason of such misconstruction."

Neilson v. *Lagow*, 12 How., 109.

The same principle applies where there is alleged error in the construction of the statute by which a contract was made by the State with plaintiff, and in the construction of subsequent State legislation, by which he claims the obligation of his contract was impaired.

"A right or immunity set up or claimed under the Constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action. If a Federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of § 709 of the Revised Statutes, as if it had been *specifically* re-

ferred to and the right directly refused." *Chapman* v. *Goodnow*, 123 U. S., 548.

"Whenever the highest Court of a State, by *any form of decision*, affirms or denies the validity of a judgment of an inferior Court, over which it can by law exercise appellate authority, the jurisdiction of this Court to review such decision, if it involve a Federal question, will, upon a proper proceeding, attach. It cannot make any difference whether, after an examination of the record of the Court below, such decision be expressed by refusing a writ of error or *supersedeas*, or by dismissing a writ previously allowed. And when this Court has once acquired jurisdiction, it may send its process, in the enforcement of its judgment, to the appellate Court of the State or to the inferior Court whose judgment is reversed." *Williams* v. *Bruffy*, 102 U. S., 356. And this Court awarded final judgment here, reversing the judgment of the State *Circuit Court*, and awarding judgment to plaintiff for what it held to be due him.

Where a controlling Federal question stands in the very front of the litigation, to give a judgment the other way, without considering it, is simply to ignore one of the most important elements in the case, and this Court has jurisdiction.

DesMoines Nav. Co. v. *Iowa Homestead Co.*, 123 U. S., 555.

Attention is called, also, to § 8, art. 4, of the Constitution of 1868 of the State, then in force: "When a judgment or decree is reversed or affirmed by the Supreme Court, every point made and distinctly stated in writing in the cause, and fairly arising upon the record of the case, shall be considered and decided, and the reasons therefor shall be concisely and briefly stated in writing, and preserved with the records of the case."

As already shown, the decision and judgment of the Circuit Court in this case are *ex necessitate rei* the decision and judgment of the State Supreme Court, and a minute consideration of so much of the opinions of the three several Judges of the State Supreme Court as treats of the Federal questions would only support this conclusion as to those questions.

Gary, A. J., states:

1. The acts of the Legislature and conveyances vesting title in plaintiff to the Columbia Canal, together with the lands held therewith, including the strip of land on which the electric and supplementary steam plant of defendant have been erected since the conveyance to plaintiff, January 11, 1892 (*Record, 5, fol. 11*), the contract of defendant, May 26, 1892, and the act of the Legislature, December 24, 1892, under which alone defendant claims. *Record, 27, fols. 50, 51.*

2. That *one* of the objects of plaintiff's action is to have declared null and void the contract between the State and the defendant as to the five hundred horse power of water power, on the ground that the State could not lease the same. *Record, 29, fol. 54.*

3. That a question for consideration is, whether or not the contract between the State and the defendant relative to the five hundred horse power of water power is null and void—that *this* contract received legislative construction when it was ratified by the act of the Legislature, December 24, 1892, which legislative construction placed upon said contract in *1892* shows the intention of the State, when it reserved the five hundred horse power of water power in *1887!* is in harmony with the terms of *said* contract [*it only approved and ratified*] that the use of the word absolute (§ 7, act of 1887,) was for the purpose of cre-

ating a right in the State to this five hundred horse power, separable and distinct from ownership in other lands, and not dependent upon any particular lands to which it may be appurtenant. The reservation of the five hundred horse power of water power being a right of *profit a prendre*. *Record, 31, 32, fols. 59, 60; defendant's Brief, 15, 16.*

4. That the contract between the State and the defendant, contract and act of 1892, is not null and void. *Record, 33, fol. 63.*

5. Declines to consider plaintiff's contention that the contract and act of 1892 could not, and did not, confer upon defendant the supplementary right to erect a steam plant on the banks of the plaintiff's canal, or to review the Circuit Judge's decision that it did confer such right. *Record, 33, 34, fol. 63.* In support of plaintiff's contention, see *Plaisted et al.* v. *Inhabitants of Lincoln*, 62 Maine, 917.

6. The views taken by him render it unnecessary to decide specifically the other exceptions of plaintiff. *Record, 34, fol. 64.*

McIver, C. J. "I concur in the result, as I am not satisfied that plaintiff ever acquired a title to the land upon which the works in question have been erected, for this does not depend solely upon the solution of a question of fact, as seems to be supposed." *Record, 34, fol. 64. This land is the bank of plaintiff's canal.* In so far as matter of fact is concerned, see Circuit decision, which controls. *Record, p. 20, fol. 38; defendant's Brief, 13, 14; opinion of Gary, A. J.; Record, p. 27, fol. 50.* In so far as matter of law is concerned, see *Bishop* v. *Seeley, 18 Conn., 393.* "*Canal* is unlike the words river, pond, lake, and other words used to designate natural bodies of water, the ordinary meaning of which is confined to the water itself, but *the word canal includes also the banks.*"

Y. J. Pope, A. J. "I concur in the result." *Record, 34, fol. 64.*

Reading the opinions of the three State Supreme Court Judges alone, or as they should be read in connection with the Circuit decree and exceptions thereto by plaintiff, taken on appeal to the State Supreme Court, and the pleadings, and it is patent:

1. That the defendant's contract of 1892 and the act of 1892 and the act of 1887, plaintiff's contract with the State are all construed.

2. That the obligation of plaintiff's contract with the State is decided to be not impaired by the subsequent contract and act, which, therefore, are, *as construed*, decided to be in full force and virtue.

3. That this subsequent legislation, and the defendant's actings and doings thereunder, and in which they find their sole justification, it is decided do not deprive plaintiff of its property without due process of law.

If this last is not *specifically* decided, it is *generally* decided; and even the evasion of its decision would not prevent the jurisdiction of this Court attaching.

But assuming, for the sake of argument, and for that purpose only, the correctness of the assumption in *defendant's Brief, page 19*, "that the Supreme Court of South Carolina did not pass upon the act of 1892, but based its decision solely upon the act of 1887," still as "the State Court upholds the subsequent law, on the ground that the contract did not confer the right claimed, this Court may inquire whether the supposed contract did give the right; because, if it did, the subsequent law cannot be upheld." The exact point decided not only *tolidem but ipsissimis verbis, in N. O. Water Works* v. *La. Sugar Co., 125 U. S., 38*, last sentence on the page.

"The established rule is, that where the judgment of the highest Court of the State, by its terms or *necessary operation*, gives effect to

some provision of the State law, which is claimed by the unsuccessful party to impair the contract set out, and relied on, this Court has jurisdiction to determine the question whether such a contract exists as claimed, and whether the State law complained of impairs its obligation * * * The legal existence of the contract itself, and *its proper construction* are necessarily involved in the question of the alleged impairment thereof." *Mobile & Ohio R. R. Co.* v. *Tennessee*, 153 U. S., 493, supported by a wealth of authority cited.

Where it is claimed that a subsequent statute passed by a State has impaired the obligation of the contract, as claimed by the plaintiff in error, and *where such subsequent statute has, by the judgment of the State Court, in some way been brought into play, and effect been given to some or all of its provisions;* in such a case *this* Court construes the contract, in order to determine whether the latter statute impairs its obligation. *Bacon* v. *Texas, 163 U. S., 219; Louisville Gas Co.* v. *Citizens' Gas Co., 115 U. S., 683, 697.*

"Where a statute of a State creates a contract, and a subsequent statute is alleged to impair the obligation of that contract, and the highest court of law or equity in the State *construes* the *first* statute in such a manner as that the second statute does *not* impair it, whereby the second statute remains valid under the Constitution of the United States, the validity of the second statute is drawn 'in question,' within the meaning of the 25th section of the Judiciary Act of 1789." Italics in the syllabus. *The Bridge Proprietors* v. *The Hoboken Co., 1 Wallace, 116, 144.* This is the case at bar, or stated more particularly as to one *especial* point in this case thus: "If that act and the proceedings under it amounted to a contract, and that contract prohibited the kind of structure which the defendants were about to erect under the act of 1860, then the latter act must be void, as impairing that contract." *1 Wallace, 145. Mutatis mutandis,* this would read thus: "If the acts and proceedings and conveyances under them relied on by plaintiff amounted to a contract, and that contract vested title in the plaintiff to the canal and its banks, and prohibited expressly or impliedly—*Stewart* v. *Police Jury, 116 U. S., 134*—the erection of the structures by defendant on the banks of plaintiff's canal, alleged in paragraphs 12 and 13 of the complaint, to wit: the electric plant on the Southern side, and the supplementary steam plant on the Northern side of defendant's power house, the right to do which is, according to the construction placed by the State Supreme Court upon the contract and act of 1892, given thereby to the defendant, then the said latter contract and act must be void, as impairing the obligation of plaintiff's contract."

Whether there was the contract claimed by plaintiff in error, and, if so, what its effect was, and whether the subsequent statute has impaired the obligation of that contract, are questions of which this Court always has jurisdiction. *University* v. *the People, 99 U. S., 321.*

"In far the larger number of cases brought to this Court, under the clause of the Federal Constitution declaring that no State shall pass any law impairing the obligation of a contract, the question has been as to the existence and *nature* of the contract, and not the construction of the law which is supposed to impair it; and the greatest trouble we have had on this point has been in regard to what may be called legislative contracts—contracts found in statute laws of the State, if they existed at all. It has become the established law of this Court that a legislative enactment, in the ordinary form of a statute, may contain provisions which, when accepted as the basis of action, by individuals

or corporations, become contracts between them and the State within the protection of the clause referred to of the Federal Constitution." *New Jersey* v. *Yard, 95 U. S., 113, 114.*

"In determining whether a statute of a State impaired the obligation of a contract, *this* Court must decide for *itself* the existence and *effect* of the original contract, as well as whether its obligation has been impaired. *Vicksburg &c. R. R. Co.* v. *Dennis, 116 U. S., 667; Louisville and Nashville R. R. Co.* v. *Palmes, 109 U. S., 256, 257.*

The contract with defendant, May 24, 1892, being an agreement made by the Board of Directors of the South Carolina Penitentiary, the agents of the State by its authority, is an enactment to which the State gave the force of law by the act of December 24, 1892, and is a statute within the meaning of Rev. Stat., § 709, relating to the jurisdiction of this Court—so expressly decided. *Wright* v. *Nagle*, 101 U. S., 793; *N. O. Water Works* v. *La. Sugar Co.*, 125 U. S., 31; *Williams* v. *Bruffy*, 96 U. S., 183; *Jefferson Brch. Bk.* v. *Skelly*, 1 Black, 443, last sentence on page; *Mobile Railway Co.* v. *Nebraska*, 146 U. S., 446, 447.

"The only question involved in this case proper for us to consider is whether the act of the Legislature of Wisconsin, August 8, 1848, reserving to the State the water power created by the erection of the dam over the Fox River, *as construed by the Supreme Court of that State, and the proceedings thereunder*, operated to deprive plaintiffs in error of their property without due process of law."

"Notwithstanding the inhibition of the Constitution is not distinctly put in issue by the pleadings, nor directly passed upon in the opinion of the Court, it is evident that the Court could not have reached a conclusion adverse to the defendant company without holding either that none of its property had been taken, or that it was not entitled to compensation therefor, which is equivalent to saying that it had not been deprived of its property without due process of law. This Court has had frequent occasion to hold that it is not always necessary that the Federal question should appear *affirmatively on the record or in the opinion*, if an adjudication of such question were necessarily involved in the disposition of the cause by the State Court?" *Kankanna Co.* v. *Green Bay and Miss. Canal*, 142 U. S., 269. Citing *Willson* v. *Blackbird Marsh Creek Co.*, 2 Peters, 245; *Armstrong* v. *Treasurer of Athens Co.*, 16 Peters, 285; *Chicago L. Ins. Co.* v. *Needles*, 113 U. S., 574; *Eureka Lake Co.* v. *Yuba County*, 116 U. S., 410. All of which cases are full to the point.

In this case there is involved not only the question of the wrongful diversion of the five hundred horse power of water power, under color of the contract and act of 1892, in violation of plaintiff's contract, but also the decision, adverse to him, of the right of defendant to take, under their color, plaintiff's property without due process of law, as set out in 12th and 13th paragraphs of the complaint. See the allegations 142 U. S., 270, and 16 Pet., 246, 247, and contrast with the allegations of the complaint in the case at bar. In *Roby* v. *Colehoun*, 146 U. S., 159, though it did not appear from the opinion of the Court of original jurisdiction, or of the State Supreme Court, that either Court formally passed upon a Federal question, the necessary effect of the decree was to determine adversely to Roby the rights and immunities claimed by him, and the necessary effect, in law, of the judgment has been to deny those rights and immunities, and the motion to dismiss was overruled.

Where the question is presented of the violation of the Constitution

of the United States by an act of the State Legislature, and in what regard, no specific mention of the specific provision of the Constitution is necessary in order to entitle the party to a decision of the question by any court having jurisdiction to determine it, and the adverse judgment of the highest State Court necessarily involves a decision against a right claimed under the Constitution of the United States.

Spencer v. *Merchant*, 125 U. S., 352.

It has never been held that the clause of the Constitution supposed to be infringed by the State law ought to be pointed out in express terms; but the true and rational rule is, that the Court must be able to see clearly from the whole record that a certain portion of the Constitution was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied. *Proprietyrs of Bridge Co.* v. *Hoboken*, 1 Wallace, 143; *Furman* v. *Nichol*, 8 Wall, 56; *Murray* v. *Charleston*, 96 U. S., 442; *Murdock* v. *City of Memphis*, 20 Wall, 628.

The construction put by the State Supreme Court upon the contract and act of 1892 is, for the purposes of this case, to be taken by this Court as much a part of the said contract and act as if textually inserted therein. *Chicago, St. Paul & Milwaukee R. R. Co.* v. *Minnesota*, 146 U. S., 366; *La.* v. *Pillsbury*, 105 U. S., 291; *Leffingwell* v. *Wanen*, 2 Black, 603.

Not necessary that the State Supreme Court should, in terms, have passed upon the question of the repugnancy of the contract and act of 1892 to the Constitution of the United States. *Chicago Life Ins. Co.* v. *Needles*, 113 U. S., 579.

It suffices if the judgment of the State Supreme Court, by its necessary operation, gives effect to some legislative enactment of the State, which is claimed by the unsuccessful party, the plaintiff in error, to impair the obligation of the contract with him. *Lehigh Water Co.* v. *Easton*, 121 U. S., 392, last sentence.

The Federal question held by this Court to have been decided, or, what was tantamount thereto for the purposes of the jurisdiction of this Court, evaded by a State Supreme Court, the opinion of the State Supreme Court to the contrary *non obstante*. *Des Moines Nav. Co.* v. *Iowa Homestead Co.*, 123 U. S., 554, 555.

That this Court has jurisdiction in the case at bar is plain, because made plain by the repeated decisions of this Court.

II.

There being no color of right to dismissal, the specific ground of want of jurisdiction, upon which it is made, having been overruled *toties quoties*, as it has been made in this Court, and uniformly decided against, the motion to affirm the judgment will not be entertained. In *Davies* v. *Corbin*, 113 U. S. 689, this Court says: "In *Whitney* v. *Cook*, 99 U. S., 607, it was ruled that the motion to affirm could not be entertained, unless there appeared on the record at least some color of right to a dismissal. This practice has been steadily adhered to ever since, and in our opinion prevents our entertaining the motion to affirm."

The same decision for the same reason was made in *Gaines* v. *Corbin*, 113 U. S., 689. The ground that the writ of error was sued out for delay only, is clearly totally untenable in every aspect. Plaintiff is not delaying defendant in any sense. Plaintiff owes defendant neither money nor duty of any sort. Defendant is enjoying the avails arising from leasing and selling water power to which plaintiff claims that it has *de jure* the exclusive right, and the proceeds of what plaintiff claims to be

the illegal entry and trespasses by defendant upon plaintiff's realty, and the illegal erection of buildings, electric plants and supplementary steam plants by it upon the banks of plaintiff's canal, and it is in possession of plaintiff's land, all of which the State Court has held is justified by the contract and act of 1892. All that plaintiff asks is a hearing of his plaint that this judgment be reversed because its contract rights have been violated, and its property taken and given to defendant without due process of law, by statutes which contravene the provisions of the Federal Constitution. Defendant sits, plaintiff contends, in the unlawful enjoyment of plaintiff's property, *sedet at que æternum sedebit*, unless plaintiff can dislodge it from its prey by the aid of this, the highest judicial tribunal in the land.

As to the ground that the questions on which the jurisdiction depends are so frivolous as not to need argument. To show that they are so, even if the Court could entertain it, which under its decisions quoted and uniform practice it will not do, has an equally void foundation. This is manifest from the action of the Circuit and Supreme Courts; but how totally destitute of substance is this ground of the motion to affirm the judgment can only be fully understood by reading the complaint and answer, to which this Court is respectfully referred.

The scope of only the most salient features of the Federal questions involved in the contention will be here adverted to.

Plaintiff contends that by the act of 1887, and the act of 1890 amendatory thereof, and the conveyances thereunder, it became seized in fee on January 11, 1892, of certain realty, including notably the Columbia Canal and its banks, and certain rights, franchises, privileges, and properties, notably an essential one, the essential one, that which induced the purchase, and without which there would have been no inducement whatever to make such an investment, the exclusive right, franchise, privilege to "sell or lease the water power of the canal, subject to such rules and regulations as plaintiff should prescribe." § 21, Act 1887; 19 St. So. Ca., 10, 96; § 2, Act 1890; 20 St. So. Ca., 698.

The only limitation which is claimed to exist to this exclusive franchise and property, in so far as this case and defendant are concerned, is the obligation in § 7 of the act of 1887 to "furnish to the State, free of charge, on the line of the canal, 500 horse power of water power. * * * *Provided*, That the right of the State to the free use of the said 500 horse power shall be absolute, and any mortgage, assignment or other transfer of the said canal shall always be subject to this right. Immediately after the grant of this exclusive franchise, the same section—§ 21, act of 1887—says this 500 horse power of water is to be provided for the State at the penitentiary; § 2 of the same act provides that it is for the use of the penitentiary. Plaintiff contends that the proviso in § 7, when construed in connection with the other sections of the act (with or without the other acts *in pari materia*, which, on the rule laid down by Lord Mansfield in *The Earl of Ailesbury* v. *Pattison*, 1 Douglass, 30, should be taken together), can only mean that the State shall have the right to use this power free of charge at the penitentiary, for the use of the penitentiary, for all time, and no mortgage, assignment or transfer can destroy the right so to use it. The whole of the act must be read together; and if so, the right to the free use of it must be exercised in the manner prescribed by it. It must also be remembered that the act itself authorized a mortgage of the entire property, and it was to save and protect this right to free use—*i. e.*, without pay—against mortgages and conveyances, that the word absolute was used. Defendant

and the Board of Directors, May 26, 1892, entered into the contract about this 500 horse power of water power, which was approved and ratified by the Legislature, December 24, 1892.

Nota Bene. ☞That throughout this contract this five hundred horse power of water power is always spoken of as reserved by the State of South Carolina "*for the use of the South Carolina Penitentiary.*"

What was meant by "*for the use of the penitentiary*" had long been fixed by statute act September 21, 1866, "water power to be made available for manufacturing purposes within the penitentiary enclosure" by convict labor. Plaintiff's views, perhaps too liberal and enlarged, of what uses the five hundred horse power of water power could be put to, are set out in paragraph 10 of the complaint. Defendant's continued illegal leasing and selling and misappropriation of this horse power of water for its private gain, is set out in paragraph 11 of the complaint.

Plaintiff contends that the State, by the terms of the contract, is entitled to the five hundred horse power of water power only *qua* State for the use of the penitentiary; can use it at most only for public purposes, and most assuredly cannot sell or lease it to private parties for private purposes, and enable them to compete with plaintiff in the selling and leasing of water power, of which franchise and privilege it should *de jure et ex contractu* be in the exclusive enjoyment.

Sec. 11 of the complaint shows how, by adjustment between the parties, a manner was adopted by which the five hundred horse power of water power was furnished to the State, defendant, as agent of the State, obtaining all that it claimed in the way of erection of plant and works on plaintiff's land; and secs. 12 and 13 of the complaint show the high-handed trespasses on and taking of other lands of plaintiff, and the unauthorized erection of electric and supplementary plants on the banks of plaintiff's canal, to the great danger to the safety of the canal, and great damage to the embankment. Sec. 16 of the complaint sets out the relief to which plaintiff conceives itself entitled by injunction and compensation.

The answer of defendant denies that the banks of the plaintiff's canal are plaintiff's property. This question of title has been decided in plaintiff's favor, as already shown, and, as matter of law, is utterly untenable, as already shown.

Defendant's answer further sets up the act of 1887 as showing that plaintiff had not the exclusive franchise claimed, and that the State had the right to dispose of the 500 horse power of water power in any way she chose.

The allegations of §§ 12 and 13 of the complaint, as to the trespasses on plaintiff's land and the buildings forcibly and illegally erected, against plaintiff's protestations, on the banks of plaintiff's canal, are answered thus in paragraph IV. of the answer: "Defendant denies that it ever intended to injure the plaintiff in its franchises, privileges, and property by the erection and maintenance of the engine, boilers, and other machinery referred to in the 12th and 13th paragraphs of the complaint, *and denies that said engine, boilers, and other machinery are located upon any land in which the said plaintiff has any interest whatever.* On the contrary, it alleges that said engine, boilers, and machinery were erected for the purpose of maintaining the power which the works so erected were calculated to develop from the use of the water power alleged in said complaint, in case the said canal should be inadequate, on account of high water or any defect in said canal to furnish the power required of it."

As to which it need only be said, that it is decided in this case that

plaintiff had fee simple title to the land on which defendant's erections were made, and that said decision was affirmed by the State Supreme Court, on defendant's carrying up the point by exception (*Record, page 28, fol. 42, exception 2*); and all apprehension of loss from the casualty referred to in the latter portion of paragraph IV. of the answer, while it would, in no event, afford any justification or excuse for defendant's unwarranted entry, or forcible seizure of, and illegal erections of buildings on the banks of plaintiff's canal, to the damage and danger of the safety thereof, had been carefully guarded against in defendant's contract with the Board of Directors of the penitentiary. *Record, p. 18, fol. 34.* This clause is omitted from the contract as it appears in *defendant's Brief, page 9*, and occurs in the space on that page of its Brief covered by asterisks.

The answer then sets up the contract with Board of Directors of the South Carolina Penitentiary, May 26, 1892, and the act of the Legislature approving and ratifying the same. It is proper to add that, according to the law and practice in South Carolina, all the allegations of the plaintiff's complaint not denied by the answer of the defendant are admitted (So. Ca. Code, §§ 170, 189; 2 Rev. St. So. Ca., 1893, pages 76, 85; *Addison* v. *Duncan*, 35 So. Ca., 173); and, also, that where the answer of defendant does not set up a counter-claim, the plaintiff is not allowed to reply, save on defendant's motion; but the new matter alleged in the answer is deemed controverted by the plaintiff as upon a direct denial or avoidance. So. Ca. Code, §§ 174, 189; 2 Rev. St. So. Ca. 1893, pp. 79, 85.

The controversion made by plaintiff of the contract and act of 1892 was on the ground of their impairment of the obligation of plaintiff's contract, in violation of the Federal Constitution, art. I, § 10, and depriving plaintiff of its property without due process of law, in violation of art. XIV., Cons. U. S.

The real contest as to law points was as to the construction of the acts, and as to whether the contract and act of 1892 impaired the obligation of plaintiff's contract and divested it of its property. I quote *verbatim* the opening sentence of this branch of the argument by one of defendant's counsel before the Supreme Court: "Plaintiffs allege a prior contract with them, and that the act of 1892 violates that contract; and therefore they say our contract is null and void, and will be disregarded." The idea that the Federal questions involved and decided are frivolous is generated by the aversion to their being brought before this Court for review. The Federal questions decided against plaintiff are not frivolous under any definition of the word ever given. See them collected, 2 Till & Sherman's Practice, 191; Wait's N. Y. Annotated Code, 439, note 1; *Cottrell* v. *Cramer*, 40 Wisc., 558, 559.

e. g., Is it frivolous to ask this Court, having jurisdiction, to determine whether defendant has a right to do what is alleged (and not denied) in 12th and 13th paragraphs of the complaint? Is it frivolous to ask this Court to determine whether the State, by the contract and act of 1892, the sole claim of defendant, can confer upon defendant this right? Is it frivolous to ask this Court to determine whether a decision that the act and contract of 1892 did confer upon defendant such right is justified by this logic?

Quotation from Circuit decree which, by non-reversal, is affirmed by State Supreme Court: "Now, has the defendant the *supplementary* right to put in a steam plant? Prudence and foresight justifies its erection on the banks of a *canal* along a river where freshets come; and

where time is important, there might be serious interruption to the industries of the defendant company, and thus of the penitentiary; *therefore*, the defendant has a right to use so much steam plant as is necessary to supplement its water power, at such times as the water power is unavailable by reason of freshets, or necessary repairs to the canal, or other causes. The dam may break, rains may swell the river, and there might be a long interruption to the use of the water power, and it would be necessary to resort to the steam plant to carry on the work. It is common to use steam as an adjunct to water power plants. The defendant cannot erect any more steam plant than is necessary for it to use as a supplement to the water power which it has received from the State. I therefore hold that there has been no violation of the State's contract with the plaintiff." Record, p. 21, fol. 40; defendant's Brief, p. 15.

However admirable this logic may be to show the wisdom of defendant's erecting a steam plant on the banks of *its* own canal, we fail to see how any construction of defendant's contract and the act of 1892 can confer upon defendant the legal right to erect that steam plant on the banks of plaintiff's canal without interfering with the obligation of plaintiff's contract with the State, and without depriving plaintiff of its property without due process of law.

Besides, in addition to the gravity and importance of the Federal questions arising from defendant's trespasses upon plaintiff's land, and the forcible seizure of and depriving plaintiff thereof, *et alia enormia*, set out in paragraphs 12 and 13 of the complaint, admitted by non-denial, justified only by the defendant's contract of 1892, and the act of 1892, approving and ratifying the same, as they are construed by the State Court, there is the grave and important question of depriving plaintiff of its exclusive right and franchise to sell and lease the water power developed by the canal, the controlling inducement and sole enticing lure held out to plaintiff to purchase the canal, lands, rights, privileges, and properties held therewith, which has only the same justification. Is it a frivolous contention that, under a fair construction of the contract with plaintiff, made by the State, the State was to be furnished by the plaintiff with five hundred horse power of water power, at the penitentiary, for the use of the penitentiary, that use settled and defined by previous legislation, and to be used for no other purpose, and to be put to no other uses?—certainly not to uses and purposes beyond those of the State, *qua State*, in its public institutions, where the same was needful for supplying public wants and requirements—and, least of all, to a rival private corporation for its private gain in leasing and selling this water power as its own for manufacturing and other industrial purposes—a rival private corporation which, at the nominal price it pays, can successfully compete with and undersell plaintiff in the market, and has so done, and so continues to do! One moment's glance at the *quid* and *pro quo* of this contract. The defendant is to build on *plaintiff's land, with plaintiff's material*, above and below ground, bulkheads, water ways, water gates, tail races, mason work, buildings, and water wheels, and to transmit one hundred, at most, horse power of water power, within the walls of the penitentiary, the place where it is to be used, this being the maximum amount which, according to the contract, can be required for the use and benefit of the penitentiary, and is to pay $2,500 annually, at most, less the deductions provided for, to the directors of the penitentiary for license to commit these trespasses. The contract gives to the defendant "all the

land on the west side of the canal, and the river opposite the walls of the penitentiary." *This includes portion of the western bank of plaintiff's canal; every foot of this land is plaintiff's in fee simple, and so decided in this case.*

This contract further gives to defendant all plaintiff's stone masonry, stone, and other material on plaintiff's land aforesaid, together with the privilege of quarrying and using such other stone, earth, and other material, the property of plaintiff, as may be necessary for the erection and proper execution of defendant's work, the free and uninterrupted use and enjoyment of the right of way along the banks of plaintiff's canal, to and from Gervais street to the works defendant is to erect on plaintiff's land. The Board of Directors is to receive from defendant annually $2,500 for these trespasses on plaintiff's rights and property, the amount to be diminished on a flexible scale, and then, as by a *crescendo* movement, the contract gives defendant at least 400 horse power of water power, plaintiff's property, not one fraction or iota of which is or can, according to the contract, be required by or for the State for the use of the penitentiary, or for any other public purpose whatever. This deal is to endure for a generation—mayhap *in perpetuum*. The iron rule of the Holy Alliance might, by the *vis major*, legalize in European public law the partition of Poland, but the South Carolina Legislature cannot legalize such a transaction as this! No, not even if she had put it in her organic law. *N. O. Gas Co.* v. *La. Light Co.*, 115 U. S., 672, 673; *Woodruff* v. *Trapnal*, 10 How., 187; *Gibbons* v. *Ogden*, 9 Wheat., 74; *Slaughter House Cases*, 16 Wall., 65; *People* v. *Platt*, 17 Johns., 195. And yet, when the power of the South Carolina Legislature to legalize this transaction is questioned by the spoliated plaintiff, we are told the question is frivolous!

Is it frivolous to question the right of the Board of Directors of the penitentiary, or the right of the State, to make such an assignment or lease? When attention is called to the well settled principle of law that "rights arising out of contract cannot be transferred, if they involve a relation of personal confidence, and that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided." Pollock on Contracts, 4th ed., 425; *Arkansas Smelting Co.* v. *Belden Co.*, 127 U. S., 388.

Is it frivolous to argue, under the terms and circumstances of this contract, that it was the intention of all those in interest, parties to it, that the right to be furnished with the 500 horse power of water power should not be assignable (*id.*, 127 U. S., 387); and that the non-assignability of this right would be in accordance with the principle mentioned and the other cognate principles relative to the subject?

Is it frivolous to argue that a signification alien to the true one has been put upon the word *absolute* by the State Court? that an erroneous construction has been made by the State Court of the clause in the act of 1887: "*Provided*, That the right of the State to the free use of the said 500 horse power shall be absolute, and any mortgage, assignment or other transfer of said canal by the Board of Trustees or their assigns shall always be subject to this right?" § 7, Act of 1887, 19 S. C. Stat., 1092.

Is it frivolous to argue that the true meaning is, that the State, *qua State*, is to have the [redacted] right to this power, free of charge,—not to pay for it,—and that the canal property cannot be relieved of this servitude to furnish this water power, free of charge to the State, by any mutation in the ownership or possession of the canal?

Rule 21 of this Court provides that the counsel for plaintiff in error shall file with the clerk a printed brief, which shall contain *inter alia* a specification of the errors relied upon, which shall set out separately and particularly each error asserted and intended to be urged. These are shadowed forth in the plaintiff's exceptions to the Circuit decree. The errors already assigned are in compliance with § 997, R. S. U. S. But there are "points growing out of, and connected with, the general Federal questions, and so blended with them as not to be separated, and, therefore, falling equally within the decision contemplated by the 25th section of the judiciary act." *Williams, trustee*, v. *Oliver*, 12 Howard, 124. These, according to the rule, are not required to be filed more than six days before the case itself is called for argument.

Are the following frivolous questions, the decisions upon which by the State Court, adverse to plaintiff, in so far as they were distinctly made, may be regarded as corrollaries flowing from the errors in the decision of the main Federal questions. And those of them not decided in terms were necessarily involved in the decision.

Had a manufacturing corporation been the owner of the canal property and of a manufacturing establishment where the penitentiary is, and had vested in plaintiff the same estate, rights, franchises, and privileges which have been vested in it by the acts of 1887 and 1890, and the conveyances thereunder, subject to a servitude to furnish so much water power free of charge to the manufacturing corporation at the manufacturing establishment for its use, what would be the relative positions and rights of plaintiff and the manufacturing corporation? The right of the manufacturing corporation to this servitude would necessarily be either a right appurtenant annexed to its land or a right in gross; and the servitude of the canal property that of servient estate to the manufacturing establishment as dominant tenement, or a servitude to the manufacturing corporation simply. If the former be the case, then when the easement is assigned to a third person by the grantor, would such assignee take anything? If the latter be the case, then would the assignee take anything, the easement being a personal right and not assignable? *Peek* v. *Conway*, 119 Mass., 546–9; *Ackroyd* v. *Smith*, 10 Common Bench, 1 J. Scott, 187, 70 E. C. L.; *Savage* v. *Mason*, 3 Cushing, 505; *Spensley* v. *Valentine*, 34 Wisc., 160; *Noonan* v. *Orton*, 4 Wisc., 535; *Keppel* v. *Bailey*, 2 M. & K., 537–8, 7 Eng. Ch. Rep. The South Carolina authorities are certainly peculiarly strong in favor of plaintiff's contention in this regard. *Morse* v. *Garner*, 1 Strob., 514; *Whaley* v. *Stevens*, 21 S. C., 223; 27 S. C., 560; *Fisher* v. *Fair*, 34 S. C., 208.

An easement appurtenant or appendant to an estate in fee in the land, or in gross to the person of the grantor for life or years, is incapable of alienation or conveyance in fee. When in gross, it is purely personal to the holder; and when appurtenant, it is attached to, and is an incident to, the land, and passes with it, whether the land be for a term of years, for life, or in fee. *It is an incident to the land, and cannot be separated from or transferred independent of it.* *Kollee* v. *Knecht*, 99 Ill., 366; *Wagner* v. *Hanna*, 38 Cal., 116, 117. Easements of this nature are covenants running with the land; covenants running with incorporeal as well as with corporeal hereditaments. *Van Rensselaer* v. *Reed*, 26 N. Y., 563. No one can have such an easement, but he who has the realty to which it is appendant, while an easement in gross is a mere personal privilege, non-transferable, and cannot be made so.

If such be the law on the transfer of such an easement by a manu-

facturing corporation, is defendant in any better plight by its contract and the act of 1892?

The easement in question, the right of the State to be furnished with and the obligation of the plaintiff to furnish the water power to the State is, on any fair principle of construction of the contract, limited to a particular purpose, a *State* purpose of public utility. *Strong* v. *Benedict*, 5 Conn., 219; *Turlelott* v. *Pheps*, 4 Gray, 374; *Sibley* v. *Hoar*, 4 Gray, 222; *Garland* v. *Hodson*, 46 Me., 515; *Washabaugh* v. *Oyster*, 6 Pa. St., 497; *Deshon* v. *Porter*, 28 Me., 289; *Stockbridge Iron Co.* v. *Hudson Iron Co.*, 107 Mass., 291, 309, 324.

Beside the restriction to the *locus*, the penitentiary, and that to the *use* of the penitentiary, the State had let fall the management of the canal, discontinued its appropriations, and did not go into the business of renting water power, and manufacturing for gain, and, under the law, could not.

"The State has not the right to engage in any trade or business for gain." *Mauldin* v. *Greenville*, 33 S. C., 1. What the State cannot do directly, it cannot do indirectly. *Qui facit per alium, facit per se.*

Is it a frivolous question whether the holding of Gary, A. J. (even if a mere *dictum*, as plaintiff contends), that the right of the State to the power is "a right of *profit a prendre*," is correct or not? when such consequences seem to flow from it, and when plaintiff contends, under Godard on Easements, p. 771; Gould on Waters, §§ 299, 310; Angell on Water Courses, §§ 142, 143, 7th ed., that it is an easement, and not a *profit a prendre*, the reason being that water is not a part of the produce of the soil, and is not the property of the owner of the land over which it flows, or on which it is standing. Is it a frivolous question to contend that under the contract of the State with the plaintiff "the use of the water power was confined to a special place and to a specified purpose?" Gary, A. J., Record, p. 32, fol. 61.

In addition to these questions, it may be necessary that plaintiff should ask to be allowed to argue before this Court what is said in the opinion of Gary, A. J., as to the State being a necessary party to this action, as to its equitable features, which plaintiff contends is only an individual *dictum*, and to show the reverse of this to be correct, and that this is established by the cases of *Poindexter* v. *Greenhow*, 114 U. S., 293; *Allen* v. *B. & O. R. R. Co.*, 114 U. S., 311, and others of that type, as effectually in regard to so much of the matters as involve plaintiff's right to an injunction, as is established by the case of *U. S.* v. *Lee*, 106 U. S., 196, and others of that type, in regard to plaintiff's right for pecuniary compensation for the injuries inflicted on its property.

The action was neither in form or substance against the State. It is at most a contest between a prior and subsequent grantee from the State—an action by one private corporation, plaintiff, against another private corporation, defendant, as a wrong doer in its private capacity for certain trespasses upon the property and rights of plaintiff already committed, and for the prevention of others about to be committed, a joinder sanctioned by the highest authority, State and Federal. *Bird* v. *R. R. Co.*, 8 Rich. Eq., 46; 64 A. D., 739; *Lamar* v. *R. R. Co.*, 10 S. C., 480; *Busby* v. *Mitchell*, 29 S. C., 452; *Tyler* v. *Maguire*, 17 Wall., 284, 285.

The sole justification for defendant's trespasses is the act of 1892, approving and ratifying the contract of 1892, which were challenged by the plaintiff both before the Circuit and State Supreme Courts, as

made in violation of the provisions of the Federal Constitution, that no State shall pass any law impairing the obligation of contracts, and that no State shall deprive any person of property without due process of law. This last pronibition extends to all acts of the State, whether through its legislative, executive or judicial authorities. *Scott* v. *McNeall*, 154 U. S., 45.

The State Courts have on this issue decided in favor of defendant, decided that this contract and act are not repugnant to the Federal Constitution.

This is the sole *fonset origo* of plaintiff's resort to this Court. As the jurisdictional question, it may be fairly assumed, is the one on which defendant relies in this controversy, plaintiff closes the views it submits, whose extended length can be justified only by the importance of this Court's decision, to the present well being and future prospects of plaintiff, by the citation of these additional authorities in support of the jurisdiction: *Hall* v. *Decuir*, 99 U. S., 500; *Delmas* v. *Ins. Co.*, 14 Wallace, 688; *State Bk. of Ohio* v. *Knoop*, 16 How., 391; *Ohio Ins. L. & Trust Co.* v. *DeBolt*, 16 How., 422, 423; and by these to show that the right of the State to the water power is an easement, not a *profit a prendre*. *Manning* v. *Wasdall*, 2 Harr. & Woll., 441; 3 Kent, 427; *Hill* v. *Lord*, 48 Me., 49; *Post* v. *Pearsall*, 22 Wend., 433; *Prince* v. *Heator*, 70 N. Y., 421; *Ritzer* v. *Parker*, 8 Cush., 147; *Huntingdon* v. *Asher*, 96 N. Y., 505; and that it is a right to it only for the use of the penitentiary, a right which the State cannot sell or lease. *Rochdale Canal Co.* v. *Radcliffe*, 18 Adol & Ellis, N. S., 307–311; 83 E. C. L.

LEROY F. YOUMANS,
For Plaintiff in Error.

THE STATE OF SOUTH CAROLINA.
IN THE SUPREME COURT.

THE COLUMBIA WATER POWER COMPANY, PLAINTIFF, APPELLANT,

against

THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER COMPANY, DEFENDANT, RESPONDENT.

To the Honorable Henry McIver, Chief Justice of the Supreme Court of the State of South Carolina:

The petition of the Columbia Water Power Company showeth, that on the 18th day of February, 1895, this Court entered a final judgment herein in favor of the defendant, The Columbia Electric Street Railway Light and Power Company, against this plaintiff, in which judgment, and the proceedings had prior thereunto in this cause, certain errors were committed, to the prejudice of this plaintiff, some of which will more in detail appear from the assignment of errors which accompanies this petition. Wherefore this plaintiff prays that a writ of error may issue in this behalf to the Supreme Court of the State of South Carolina, for the correction of errors so complained of, and that a transcript of the record and proceedings in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

ABNEY & THOMAS,
BACHMAN & YOUMANS,
Plaintiff's Attorneys.

January, 1897.

Be it so, the plaintiff giving bond, according to law, in the sum of five hundred dollars on the issuing of the citation.

HENRY MCIVER,
Chief Justice of the Supreme Court of South Carolina.

January, 1897.

THE STATE OF SOUTH CAROLINA.
IN THE SUPREME COURT.

THE COLUMBIA WATER POWER COMPANY, *Plaintiff, Appellant,*
against
THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER COMPANY, *Defendant, Respondent.*

The plaintiff in this action, in connection with its petition for a writ of error, makes the following assignments of error, which it avers occurred in the judgment herein, and the proceedings prior thereunto had in this case.

That error was committed in deciding in favor of the validity of the

contract between the defendant and the Board of Directors of the South Carolina Penitentiary, May 26, 1892, and the act of the General Assembly of the State of South Carolina, December 24, 1892, which were drawn in question, on the ground of their being repugnant to the Constitution of the United States, in this, that they impaired the obligation of the contract made by the State of South Carolina, act December 24, 1887, as to the rights, franchises, and privileges of plaintiff, as owner in fee of the property known as the Columbia Canal, and more especially as to the plaintiff's sole and exclusive right, franchise, and privilege to sell and lease the water power developed by said canal, and as to the five hundred horse power of water power to be furnished to the said State; and in this, that they deprived plaintiff of its property without due process of law.

ABNEY & THOMAS,
BACHMAN & YOUMANS,
Plaintiff's Attorneys.

January, 1897.

I, U. R. Brooks, Clerk of the Supreme Court of the State of South Carolina, do hereby certify that the foregoing is a true and correct copy of the originals on file in my office. In witness whereof, I have hereunto affixed my hand and the seal of the Supreme Court, this 6th day of May, A. D. 1897, at Columbia, S. C.

[Seal.]

U. R. BROOKS,
Clerk Supreme Court of S. C.

Although the petition to the Chief Justice of the State Supreme Court for allowance of the writ of error constitutes no portion of the record proper (*Warfield* v. *Chaffee*, 91 U. S., 692; *Clark* v. *Pennsylvania*, 128 U. S., 397), yet, as the assignment of errors accompanying said petition shows the grounds on which, and on the decision of what questions, said Chief Justice allowed the issuance of said writ, the plaintiff prays that the original of the foregoing certificate be filed with the record.

LEROY F. YOUMANS,
For Plaintiff in Error.